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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 187

HUBERT VAN HOOK, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court denying the taxpayer's motion for summary judgment (R. 22-24) is reported in 108 F. Supp. 32, and the opinion rendering judgment for the taxpayer (R. 36-38) is reported in 107 F. Supp. 499. The opinion of the Court of Appeals (R. 46-50) is reported in 204 F. 2d 25.

JURISDICTION

The judgment of the Court of Appeals was entered on May 13, 1953. (R. 50.) The petition for

a writ of certiorari was filed on July 17, 1953. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether the taxpayer is entitled to the tax reduction benefits of Section 107 (a) of the Internal Revenue Code, as amended, with respect to a fee for legal services received in 1946, where the compensation taxpayer received was for services rendered during a period of about thirteen months.

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 107 [As added by Sec. 220 (a), Revenue Act of 1939, c. 247, 53 Stat. 862, by Sec. 139 (a), Revenue Act of 1942, c. 619, 56 Stat. 798, and by Sec. 119 (b), Revenue Act of 1943, c. 63, 58 Stat. 21] COMPENSATION FOR SERVICES RENDERED FOR A PERIOD OF THIRTY-SIX MONTHS OR MORE AND BACK PAY.
>
> (a) *Personal Services.*—If at least 80 per centum of the total compensation for personal services covering a period of thirty-six calendar months or more (from the beginning to the completion of such services) is received or accrued in one taxable year by an individual or a partnership, the tax attributable to any part thereof which is included in the gross income of any individual shall not be greater than the aggregate of the taxes attributable to such part had it been included in the gross income of such individual ratably over that part of the

period which precedes the date of such receipt or accrual.

* * * * *

(26 U.S.C. 1946 ed., Sec. 107.)

STATEMENT

The facts as found by the District Court (R. 36-37) may be summarized as follows:

In September, 1941, one Thomas C. McConnell, an attorney, began work on a case which was subsequently litigated as *Bigelow* v. *RKO Radio Pictures*. It was argued and decided in the District Court, the Court of Appeals, and this Court. (R. 36.) In July, 1943, McConnell moved into the offices occupied by the taxpayer and three other attorneys. They shared office expenses, but not income, unless they agreed to work together on a particular case, and were not associated as partners. In February, 1945, more than three years after McConnell had started work on the case, and at his request, the taxpayer began working with McConnell in the preparation and litigation of the appellate phase of the case. (R. 36-37.) The case was finally decided by this Court[1] in February, 1946. A legal fee of approximately $120,000 was paid by the clients and the taxpayer received $20,000 as his share. In computing his federal income tax liability for 1946, the taxpayer allocated the fee over a period of fifty-three months, beginning with September, 1941, when McConnell alone had begun to

[1] *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251.

work on the case, allegedly pursuant to Section 107 (a) of the Internal Revenue Code. (R. 37.)

Upon an audit of the taxpayer's return, the Commissioner proposed a deficiency on the ground that the taxpayer was not entitled to the special relief provisions of Section 107. (R. 3-4.) The taxpayer paid the deficiency and later filed a claim for refund, which was disallowed. (R. 4.) Thereupon he instituted this suit for refund. (R. 3-5.) After the United States answered the complaint, the taxpayer filed a motion for summary judgment (R. 21) which the District Court denied on the ground that there remained an issue of fact, namely, whether an actual joint venture existed between the taxpayer and McConnell (R. 22-24). Upon hearing evidence on this issue, the District Court decided that a joint venture existed and rendered judgment for the taxpayer. (R. 36-38.) The Court of Appeals reversed the judgment of the District Court, holding that the taxpayer was not entitled to invoke the special benefits of Section 107 (a) even though there was a joint venture during the thirteen months taxpayer worked with McConnell. (R. 46-50.)

ARGUMENT

1. The decision of the court below is correct. The taxpayer here is invoking the tax reduction benefits of Section 107 (a) of the Internal Revenue Code, as amended (*supra*, pp. 2-3), which provides in substance that if at least 80% of the total compensation for personal services covering a period of thirty-six calendar months or more is received in one taxable

year by an individual or a partnership, the taxpayer should be taxed in that year as though the compensation had been spread over the period of the services, and an aliquot part had been added to his income in each of the component years. The purpose of the statute was to grant relief from the hardship falling upon persons who work for long periods of time without pay and then receive their compensation in a lump sum all in one year.[2] Since Section 107 (a) is a relief provision in the nature of an exemption, the taxpayer must show that he comes squarely within the terms of the statute. *Lindstrom* v. *Commissioner,* 149 F. 2d 344, 346 (C.A. 9th); *Smart* v. *Commissioner,* 152 F. 2d 333, 335 (C.A. 2d), certiorari denied, 327 U.S. 804. See also *New Colonial Co.* v. *Helvering,* 292 U.S. 435, 440; *White* v. *United States,* 305 U.S. 281, 292; *McDonald* v. *Commissioner,* 323 U.S. 57, 60.

The evidence in this case clearly shows that the $20,000 received by the taxpayer in 1946, the taxable year, was compensation for legal services with respect to the appellate phase of the *Bigelow* litigation. For that phase of the case, the taxpayer and McConnell formed a joint venture or partnership, which started in February, 1945, and ended in February, 1946, thus covering a period of about thirteen months. (R. 27-28, 29, 34, 48.) Inasmuch as Section 107 (a) expressly provides that the compensation received by the individual must be for personal services covering a period of thirty-

[2] S. Rep. No. 648, 76th Cong., 1st Sess., p. 7 (1939-2 Cum. Bull. 524, 528-529).

six months or more, the taxpayer failed to meet one of the essential requirements of the statute and therefore is not entitled to invoke its benefits. See *Smart* v. *Commissioner, supra; Civiletti* v. *Commissioner,* 152 F. 2d 332 (C.A. 2d), certiorari denied, 327 U.S. 804; *Whitman* v. *Commissioner,* 178 F. 2d 913 (C.A. 2d); *Cowan* v. *Henslee,* 180 F. 2d 73 (C.A. 6th); *Sovik* v. *Shaughnessy,* 191 F. 2d 895 (C.A. 2d); *Lindstrom* v. *Commissioner, supra.*

It is true, as the taxpayer contends (Br. 9), that the statute does not require that a taxpayer personally render the services, provided he is a member of a partnership that did render the services over the requisite three-year period. In the present case, however, the only services rendered by the joint venture or partnership were performed during a period of thirteen months, and the taxpayer's share of the partnership income did not embrace any services performed earlier. The services rendered during the prior period were performed by the taxpayer's associate in an individual capacity and, as is plain from the manner in which the fee was divided and as the Court of Appeals correctly observed (R. 48), the taxpayer did not share in the compensation earned by his associate in his individual capacity during the earlier period when the litigation was in its trial stage.

2. There is no conflict of decisions. *Commissioner* v. *Marshall,* 185 F. 2d 674 (C.A. 3d), affirming *per curiam,* 14 T.C. 90, and *Commissioner* v. *Nielson,* 187 F. 2d 233 (C.A. 9th), affirming the

Tax Court's decision of January 26, 1950 (1950 P-H T.C. Memorandum Decisions, par. 50,024), which are asserted by the taxpayer to be opposed by the decision below (Pet. 4; Br. 8-9), are plainly distinguishable from the present case. In each of those cases services had been performed by a partnership over the period required by the statute and the taxpayers, as members of the partnership (though joining the partnership after commencement of the partnership services in question and less than thirty-six-months prior to receipt of the payment for those services), received a portion of the partnership income derived from such partnership services. Even though the taxpayers in the *Marshall* and *Nielson* cases did not personally perform services over the entire period, they were held entitled to the benefits of Code Section 107. In the present case, however, as we have already observed, there was no partnership in existence and no partnership services were performed over the requisite three-year period. Moreover, unlike the *Marshall* and *Nielson* cases, where the taxpayers did receive a portion of the income earned by the earlier services of the partnership, the taxpayer here did not receive any income relating to the earlier services performed by his associate as an individual. A decision of the Second Circuit involving the application of Section 107 (a) squarely holds that the partnership must perform the services for which it receives the compensation. *Sovik* v. *Shaughnessy,* 191 F. 2d 895. As the court below decided (R. 49), the present case is closer to the

Sovik case than it is to the *Marshall* and *Nielson* cases.

The third case relied upon by the taxpayer to show a conflict, *Hofferbert* v. *Marshall*, 200 F. 2d 648 (C.A. 4th) (Pet. 4; Br. 9), deals with the question whether a husband and wife may, in a joint return, claim the benefits of Section 107 with respect to an item of income earned by the husband. Since the present case does not involve a joint return filed by husband and wife, it is substantially different from *Hofferbert* v. *Marshall*.

There are no cases which hold that, under circumstances similar to those involved here, a taxpayer is entitled to tack a period of services rendered by another individual to a subsequent period of services performed jointly by the taxpayer and such individual. There is, in short, no conflict of decisions requiring resolution by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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